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KOPEKS HOLDINGS SDN BHD

v.

BANK ISLAM MALAYSIA BHD

B

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
SYED AHMAD HELMY JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: S-02-1480-2009]

C

21 FEBRUARY 2012

BANKING: *Banks and banking business - Islamic banking - Al-Istisna' banking facilities - Whether facilities offered consistent with concept of Al-Istisna' Sale Agreement - Whether conditions essential for completion of*

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transaction - Whether transaction rendered incomplete for failure to comply with conditions

CONTRACT: *Agreement - Facility agreement - Offer for banking facilities - Whether subject to compliance of conditions precedent - Whether formal contract executed - Whether there was concluded contract*

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The respondent offered banking facilities to the appellant for *inter alia*, redemption of two lots of land and to part-finance a development project as well as a bank guarantee/performance guarantee. The appellant commenced preliminary works despite no

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formal written agreement being executed. Subsequently, the respondent informed the appellant that the facilities offered had been withdrawn and cancelled. The appellant thus claimed against the respondent for losses suffered as a result of the wrongful withdrawal of the banking facilities. The appellant contended that

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there was a legally binding agreement between the parties upon the appellant's acceptance of the respondent's offer of banking facilities. The respondent contended that the offer made was conditional upon compliance of conditions precedent and other terms and conditions and subject to a formal contract to be

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executed between the parties. The learned trial judge dismissed the appellant's claim after finding that the intention of the parties was not to make a concluded bargain unless and until a formal contract was executed.

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Held (dismissing appeal with costs)
Per Aziah Ali JCA delivering the judgment of the court:

(1) The trial judge had not erred in distinguishing the case of *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd* as in that case the facility that was the subject matter of the case was a conventional bank loan facility. In the present case, the facility offered was the *Al-Istisna'* Islamic financing facility and the terms and conditions in the facility letter in *Mae Perkayuan* were not similar to the terms and conditions in the letters of offer in the present appeal. (para 11)

(2) The respondent's letter of offer provided for the purchase of the project by the respondent *vide* the *Al-Istisna'* Purchase Agreement and the sale by the appellant *vide* the *Al-Istisna'* Sale Agreement consistent with the requirements of the *Al-Istisna'* concept and made subject to conditions. The *Al-Istisna'* Purchase Agreement and *Al-Istisna'* Sale Agreement were essential to complete the financing transaction between the parties. The execution of the agreements was a term of the bargain and not mere formality. Hence, the two agreements would have to be executed in order to complete the financing transaction. (paras 16-17)

(3) In the circumstances, the conditions precedent could not be disregarded and until the legal documents were executed, the letters of offer issued by the respondent remained expressions of willingness on the part of the respondent to offer banking facilities to the appellant. Hence, there was no concluded contract between the parties as the transaction had not been completed. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Responden menawarkan kemudahan perbankan kepada perayu untuk, antara lain, penebusan dua lot tanah dan membiayai sebahagian projek pembangunan dan juga suatu jaminan bank/ jaminan pelaksanaan. Perayu memulakan kerja-kerja awal walaupun tiada perjanjian bertulis secara formal yang ditandatangani. Kemudian, responden memberitahu perayu bahawa kemudahan-kemudahan yang ditawarkan telah ditarik balik dan dibatalkan. Perayu, oleh itu, menuntut terhadap responden bagi kerugian yang dialaminya akibat daripada penarikan balik secara salah kemudahan-kemudahan perbankan tersebut. Perayu menghujah bahawa

terdapat perjanjian yang mengikat dari segi undang-undang di antara pihak-pihak selepas perayu menerima tawaran kemudahan perbankan responden. Responden menghujah bahawa tawaran tersebut dibuat dengan syarat pematuhan kepada prasyarat dan terma-terma dan syarat lain dan tertakluk kepada kontrak secara formal ditandatangani di antara pihak-pihak. Hakim bicara yang bijaksana menolak tuntutan plaintif selepas mendapati bahawa niat pihak-pihak bukan untuk memasuki perjanjian yang muktamad kecuali dan sehingga kontrak formal ditandatangani.

Diputuskan (menolak rayuan dengan kos)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara tidak khilaf dalam membezakan kes *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd* kerana di dalam kes itu kemudahan yang menjadi perkara kes adalah kemudahan pinjaman bank konvensional. Di dalam kes ini, kemudahan yang ditawarkan adalah kemudahan perbankan Islam *Al-Istisna'* dan terma-terma dan syarat-syarat di dalam surat kemudahan di dalam kes *Mae Perkayuan* tidak serupa dengan terma-terma dan syarat di dalam tawaran dalam kes ini.

(2) Surat tawaran responden memperuntukkan pembelian projek oleh responden melalui Perjanjian Pembelian *Al-Istisna'* dan jualan oleh perayu melalui Perjanjian Jualan *Al-Istisna'* yang konsisten dengan keperluan konsep Perjanjian Jualan *Al-Istisna*' yang penting untuk menyempurnakan transaksi pinjaman di antara pihak-pihak. Penandatanganan perjanjian adalah salah satu terma perjanjian dan bukan formaliti semata-mata. Dengan itu, kedua-dua perjanjian mesti ditandatangani untuk menyempurnakan transaksi pinjaman tersebut.

(3) Dalam keadaan ini, prasyarat tidak boleh diketepikan dan selagi dokumen-dokumen sah tidak ditandatangani, surat-surat tawaran yang dikeluarkan oleh responden kekal sebagai kesediaan pihak responden menawarkan kemudahan perbankan kepada perayu. Maka, tidak ada kontrak yang muktamad di antara pihak-pihak kerana transaksi tersebut tidak pernah disempurnakan.

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(dist)***

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Bekalan Sains P&C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***

For the appellant - Peter KC Lee; M/s Lee & Assocs
For the respondent - SH Leong; M/s Angela Ubu & Assocs

Reported by S Barathi

JUDGMENT

Aziah Ali JCA:

[1] The appellant, the plaintiff in the court below, is an investment subsidiary company of Koperasi Pekerja-Pekerja Kerajaan Sabah Berhad, a co-operative registered under the Co-Operative Societies Act 1993. The appellant claims against the respondent bank for losses it says it suffered as a result of the wrongful withdrawal of banking facilities by the respondent in breach of a purported agreement. The issue before the learned trial judge is whether there exists a legally binding agreement between the appellant and the respondent. It is the appellant's contention that there was a legally binding agreement between the parties upon the appellant's acceptance of the respondent's offer of banking facilities. The learned trial judge found that the intention of the parties is not to make a concluded bargain unless and until a formal contract is executed and dismissed the appellant's claim with costs. Having considered the submissions and the appeal records, we agreed with the learned judge and we dismissed the appeal with costs.

Appellant's Case

[2] In August 2002, the appellant had entered into two sale and purchase agreements to purchase two lots of lands (NT 213072416 and NT 21307248) for the purpose of developing the said lands into a housing project in two phases ("the project"). Phase I was to comprise 400 units and Phase II 580 of mixed housing apartments.

[3] According to the appellant by a letter dated 11 August 2001 (pp. 182-193 appeal record) the respondent offered banking facilities as follows:

> Facility I: RM9 million bridging finance comprising RM3 million to redeem the two lots of land from Borneo Housing Mortgage Finance Berhad and RM6 million to part finance the development of the 400 units in Phase I;
>
> Facility II: RM1.5 million bank guarantee/performance guarantee in favour of the Ministry of Local Government and Housing being 5% of the development costs of RM29,759,010 under Phase 1.

[4] The appellant commenced preliminary works despite no formal written agreement having been executed. Subsequently at the request of the appellant, by letter dated 9 October 2001, the respondent amended the offer in respect of Facility I by substituting RM4 million for redemption of the two lots and RM5 million for part-financing Phase 1. The respondent in its letter states that "All other terms and conditions shall remain unchanged". (pp. 194-205 appeal record).

[5] Whilst the security documents were being prepared the appellant *vide* letter dated 26 August 2002, requested the respondent to vary the development costs for Facility II from RM29,759,010 to RM28 million. On 16 December 2002, the appellant inquired about the delay in the drawdown of the facility. The respondent informed the appellant that they were awaiting a third party opinion on the facilities in order to update the respondent's Financing Committee. On 6 May 2003, the appellant informed the respondent that the vendors of the two lands intended to rescind the sale and purchase agreements and to sell the lands to other parties and they requested the appellant to expedite the drawdown of the facility.

[6] By letter dated 21 August 2003, the respondent informed the appellant that the facilities offered had been withdrawn and cancelled (p. 211 appeal record). The appellant alleged that the withdrawal of the facilities caused the failure to purchase the two lands and they were forced to abandon the project. The appellant alleged that the respondent had cancelled the offer without valid reasons.

The Respondent's Case

[7] It is the respondent's case that the offer made was conditional upon compliance with conditions precedent and other terms and conditions and subject to a formal contract to be executed which is an express term of the offer stipulated in the letter of offer dated 11 August 2001. The respondent contends that parties were still in negotiation as proven by the appellant's request to revise the amounts of the facilities and correspondences between the respondent and the solicitors show that they were in the midst of drafting the relevant security documents. Therefore the letters of offer were merely an agreement to negotiate and not enforceable in law. It is further contended that there is no legally binding agreement between the parties until the execution of formal legal documentation as stipulated under cl. 2 of the "Conditions Precedent" in the letter of offer. It is not disputed that no legal documentation had been executed and the loan had not been disbursed.

[8] The respondent further says that during the application and negotiation of the facilities the appellant had submitted its audited financial account dated 31 December 2000 (pp. 231-307 appeal record) to the respondent for consideration and had warranted and represented to the respondent that from the time of application for the facility to the time of drawdown, its cash flow and financial position shall remain good and sound. However some time in August or September 2002, it discovered from their solicitors that one of the properties was charged to Maybank. This information was not revealed by the appellant. The respondent says that the existence of the charge to Maybank and the amendment to the amount of end-financing under Facility II requested by the appellant has implications on its two offers. Thus the respondent's Corporate and Financing Committee conducted a review on 27 November 2002 which then prepared a proposal and on 29 November 2002 submitted it to the respondent's Financial Committee for a decision whether to proceed further with the letter of offer or to revoke the offer made to the appellant. The respondent also discovered from newspaper reports that the appellant had accumulated massive losses and its Board had been suspended (pp. 520-527 appeal record) which the respondent says had impaired the appellant's ability to comply with its obligations under the security documents. The respondent says

that the appellant has breached its warranty and has misrepresented to the respondent with regard to its financial position which resulted in the respondent's Financial Committee's decision to revoke the two offers made to the appellant.

The Finding By The Trial Judge

[9] The learned judge found that the appellant's acceptance of the offer was not absolute and unqualified based on the evidence that after the acceptance, the appellant had requested for variation of the development costs under Facility II. Thus the learned judge found that when the respondent cancelled the facility, parties were still in negotiation and there was no final agreement reached.

[10] The learned judge disagreed with the appellant's contention that the conditions precedent were merely for disbursement and not for approval. Having considered the terms of the letters of offer the learned judge found that it was a condition precedent that the legal documents must be executed as it was the expressed intention of the parties and it could not have been the intention of the parties to disregard the conditions precedent in the execution of the agreement. The learned judge also found that none of the documents referred to in cl. 4 of the "Conditions Precedent" in the letters of offer have been proved to have been provided to the respondent. Therefore the two letters of offer remained expressions of willingness on the part of the respondent to offer banking facilities to the appellant and a legally binding contract could only come into existence upon fulfillment of the conditions precedent.

The Appeal

[11] Before us counsel for the appellant submits that the learned judge had failed to apply the case of *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495. Counsel submits that in *Mae Perkayuan* the Supreme Court held that an offer of a loan accepted by the borrower constituted a contract of loan. Having perused the factual situation in *Mae Perkayuan* we find that in *Mae Perkayuan* the facility that is the subject matter of the case is a conventional bank loan facility which is unlike the present appeal where the facility offered is the *Al-Istisna'* Islamic financing facility. In that case the terms and

conditions in the facility letter (exh. P2) which constituted the contract of loan between the parties are not similar to the terms and conditions found in the letters of offer in the present appeal. Hence we are of the view that the learned judge has not erred in distinguishing *Mae Perkayuan*.

[12] In *Bekalan Sains P&C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232 this court *vide* the judgment of Abdul Malik Ishak JCA states *inter alia* as follows:

> In deciding whether the parties have reached an agreement, the law looks for an offer by one party and an acceptance to the terms and conditions of that offer by the other. There would be a bargaining process leading up ultimately to an agreement or meeting of the minds. This is the traditional method of analysis of an offer and an acceptance which has been applied by the courts in determining the formation of the contracts. But for a contract to be formalised, all the terms and conditions must be fulfilled. The failure to fulfil a term or a condition would not give rise to a concluded contract.

[13] An offer may be made unconditionally or upon conditions stated. In the case of an offer accompanied by terms and conditions, an acceptance to be valid must accord with the terms of the offer. In the present appeal the respondent's letter of offer dated 9 October 2001 was accompanied by terms and conditions and the full amended terms and conditions were attached to its letter as Appendix I (pp. 197-205 appeal record).

[14] The letter of offer dated 9 October 2001 makes it clear that apart from amendment to the amounts under Facility I, "All other terms and conditions shall remain unchanged." The appellant accepted the offer on 26 October 2001. Subsequently by letter dated 26 August 2002 the appellant made another request to vary the amount under Facility II. On these facts we agree with the learned judge that the appellant's acceptance made on 26 October 2001 was not absolute.

[15] We note that the facility offered to the appellant is the *Al-Istisna*' Islamic financing facility. The *Al-Istisna*' Islamic financing facility in essence is similar to the *Bai Bithaman Ajil* ("BBA") Islamic financing facility. Under these facilities there is a purchase by the bank and a sale by the customer. In *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22, Raus Sharif JCA (now PCA) explains as follows:

A Basically, a BBA contract is a deferred payment sale contract. It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a Property Purchase Agreement and also a Property Sale Agreement.

B … the Property Purchase Agreement and the Property Sale Agreement completed the BBA transaction.

[16] Consistent with the requirements of the *Al-Istisna'* concept, the respondent's letter of offer provides for the purchase of the C project by the respondent *vide* the *Al-Istisna'* Purchase Agreement and the sale by the appellant *vide* the *Al-Istisna'* Sale Agreement (see p. 197 appeal record). The *Al-Istisna'* Purchase Agreement and the *Al-Istisna'* Sale Agreement, being two agreements which are essential to complete the financing transaction between the D appellant and the respondent, are specified under the "Documentation" clause. For ease of reference we produce the said clause as follows:

Documentation: 1. *Al-Istisna*' Purchase Agreement between the bank and KHSB

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2. *Al-Istisna*' Sale Agreement between KHSB and the bank

3. Charge documents for *Istisna*' Sale

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4. Undertaking for *Istisna*' Purchase

5. Guarantee Documents *Istisna*' Sale

6. Deed of assignment and/or Irrevocable Undertaking Letter

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7. Memorandum of deposit

8. Any other legal documentation as advised by the bank's legal adviser.

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Clause 2 of the "Conditions Precedent" provides as follows:

2. Execution of all relevant legal documentation as stipulated under the "Documentation" clause above.

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These are "principal terms and conditions" (p. 182 appeal record) and remained so as stated clearly in the respondent's letter dated 9 October 2001 (p. 194 appeal record). A

[17] In the case of *Ayer Hitam Tin Dredging Malaysia Bhd v. Y.C. Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 cited by the learned judge the Supreme Court held *inter alia* as follows: B

> It is a matter of construction whether the execution of the further contract is a condition or term of the bargain, in which case there is no enforceable contract as the law does not recognise a contract to enter into a contract, or whether it is a mere C
> expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through, in which case there is a binding contract and reference to the more formal document may be ignored. In this respect, the Court, in its task to ascertain the intention of the parties will, generally speaking, D
> apply an objective test. In other words, it will ask itself what would the intention of reasonable men be if they were in the shoes of the parties of the alleged contract.

Having perused the terms of the letters of offer we find that the respondent's offer was made subject to the conditions stated. E
Considering that the facility offered was the *Al-Istisna'* financing facility, we find that it was within the contemplation of both parties that the execution of the *Al-Istisna'* Purchase Agreement and the *Al-Istisna'* Sale Agreement is a term of the bargain and not mere formality. These two agreements would have to be executed F
in order to complete the financing transaction. We agree with the learned judge that it could not have been the intention of parties that the conditions precedent could be disregarded. In the circumstances we agree with the learned judge that until the legal documents are executed, the letters of offer issued by the G
respondent remained expressions of willingness on the part of the respondent to offer banking facilities to the appellant. We find there was no concluded contract between the appellant and the respondent since the transaction between the parties had not been completed. H

[18] For the reasons stated above we dismissed the appeal with costs of RM15,000 to the respondent here and the court below and the deposit is to account of costs.

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